

**Executive Committee Dublin, 29 June 2011**  
**RECENT DEVELOPMENTS IN AUSTRIA**

*(Michel Walter)*

**I. Legislation**

No new legislation is to be reported except for an amendment to the Law concerning authors' societies (*Verwertungsgesellschaftengesetz*). According to this amendment of 2010<sup>1</sup>, the Controlling Authority (*Aufsichtsbehörde für Verwertungsgesellschaften*) now is a subdivision of the Federal Ministry of Justice.

**II. Jurisprudence**

- **Supreme Court 31 August 2011 – „Salzwellen/Cor montis“<sup>2</sup>**
  - Geometric forms as such are not copyrightable. However, the using of elements from the public domain or of stylistic devices, which are not covered by copyright protection, does not the protection of an original implementation of such elements.
  - Parts of works may enjoy copyright protection if they meet the originality requirement. On this condition, a modification thereof is to be considered as adaption requiring the author's consent, no overall view being necessary.
  
- **Supreme Court 16 December 2010<sup>3</sup>**
  - As regards interlocutory injunctions, the Brussels I Regulation refers to the rules of competence as established in the Member States. However, if the Regulation itself provides for a venue, the application for such interlocutory injunction may be filed with this court as well; insofar it is up to the plaintiff to decide where to file.
  - The venue of the place where the harmful event occurred or may occur as provided for in Article 5 no 3 of the Brussels I Regulation also applies to infringements of intellectual property rights or claims on the grounds of Unfair Competition Law. The provision is to be construed autonomously.
  - The 'place where the harmful event occurred' is to be understood as the place where the event causing the harm took place, or where the harm was inflicted. In cases of offences committed under different jurisdictions, injunctive relief may be applied for both on the place of action as well as on the place, where harm was inflicted. However, in the latter case only the place, where the immediate effect occurred, is decisive (in the case at issue: the reputation of the plaintiff was compromised). On the other hand, the place, where the assets of the infringed person may be affected, is not to be taken into consideration.
  - Under Austrian law, as long as the main proceeding is pending, application for interim injunctions may be made with the court of the main proceeding. However, according to the Brussels I Regulation, a territorial attachment of the measures applied for is a precondition for the application of this specific venue.

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<sup>1</sup> Official Journal (BGBl) 2010 I no 50.

<sup>2</sup> Case 4 Ob 51/10v MR 2011, 86 (*Walter*).

<sup>3</sup> Case 17 Ob 13/10a (not yet published).

- **Supreme Court 15 December 2010<sup>4</sup> - „Bundeshymne II/Rock me Paula“**

(moral rights of the author of the text of the Austrian national anthem)

- The Court:

In participating in an open contest put out to tender a new text for the Austrian national anthem (music by *Wolfgang A Mozart*) in 1946, the author of such text, the well known Austrian lyricist *Paula von Preradović*, by implication granted a license to the Republic of Austria to use the text for typical purposes of national anthems.

Note: Insofar the Court confirmed its earlier finding of 22 November 1994 – „Bundeshymne I“<sup>5</sup>.

- The Court:

With this regards no narrow-minded interpretation is to be applied. The creation of a pop-version of the anthem and its interpretation by a well known Austrian singer<sup>6</sup>, therefore, is deemed to be covered by such license, since it was serving the purpose of advertising the planned reform of the Austrian educational system by the Federal Ministry of Education and Cultural Affairs in the form of an video-spot.

Note: One could doubt, whether the production of a pop-version of a national anthem for whatever publicity purposes produced by an advertising agency, indeed, is covered by the ‘typical purposes of a national anthem’.

- The Court:

In principle, on the grounds of the author’s moral rights neither the work (text) as such nor its title or the credits may be altered without the author’s consent. However, the author may not forbid alterations, which comply with fair practice<sup>7</sup>. With this regard the interests of the user on the one hand and those of the author are to be balanced in taking into consideration the intensity of the violation of the work’s integrity, the degree of originality of the work, and the purpose of use at issue. In no case a significant curtailing of the author’s interests and mutilations are permitted.

The amending of the text of the Austrian anthem in adding ‘and daughters’ to ‘sons’, which are mentioned in the original, in order to ‘gender’ the text of the anthem is to be regarded as permitted. Whether such gendering could be attained by another version that would (much) more respect the original, is not decisive.

Note: Mutilations are not even permitted in cases, where the author agreed to (indefinite) alterations (Sec 21 para 3 of the Austrian Copyright Act); this criterion, therefore, should not serve as a general utmost borderline. Apart from this, the criteria elaborated by the Court appear to be appropriate. However, their application in the case at issue is not convincing.

- Supposing that the ‘gendering’ of the anthem’s text is regarded being worthwhile, contrary to the Court’s finding the less invasive solution must be applied, as e.g. the following version:

<sup>4</sup> Case 4 Ob 171/10s MR 2011,79 (*Walter*) = ZUM 2011, 360 = RdW 2011/210, 217 ) JBI 2011, 313.

<sup>5</sup> Case 4 Ob 1105/94 MR 1995, 185 (*Walter*).

<sup>6</sup> *Christine Stürmer*.

<sup>7</sup> Sec 21(1) of the Austrian Copyright Act: ‘*im redlichen Verkehr geltende Gewohnheiten und Gebräuche*’.

Original and amendment (in square brackets):

‘Heimat bist Du großer Söhne [und Töchter]’<sup>8</sup>

Less ‘invasive’ version (e.g.):

‘Heimat großer Töchter und Söhne’<sup>9</sup>

- Apart from the modified rhythm of the line at issue, also the flow of the melody is interrupted by the modified and amended text. But above all, several further modifications have been added that are not at all due to the ‘gendering’ purpose of the modification as regards e.g. the structure of the rhyme, the sequences of the choruses, and the deletion of verses causing a distortion of the sequence of thoughts as well (much praised Austria – sorely afflicted Austria – much beloved Austria).

○ The Court:

The Supreme Court was not to decide the question, whether the Austrian national anthem is deemed to be an official work, which would be exempted from copyright protection.

Note: In my opinion the inclusion of a non official work in an official work - the text of the national anthem was published in the Official Journal of Ordinances - does not change the status of such work into an official work. Whereas the Supreme Court did not explicitly confirm this opinion, the dealing with all of the other questions raised in this case would not have been necessary in case of a dissenting opinion.

*For the complete text (in German) and the modifications and amendments see page 4.*

*For the spot see YouTube: <http://www.youtube.com/watch?v=dUG5n8-JUqw>*

### **III. Activities of the Austrian Group in 2010**

- In 2010 the Austrian Group elaborated detailed comments on the draft amendment of the Law concerning authors’ societies.
- In 2011 an extensive response was prepared as regards the European Commission’s questionnaire concerning the implementation and the effects of the Enforcement Directive.
- Currently the Austrian Group is preparing an extensive and rather critical comment on the European Commission’s Proposal of a Directive on certain permitted uses of orphan works.

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<sup>8</sup> ‘Home country you are of great sons [and daughters]’.

<sup>9</sup> ‘Home country of great daughters and sons’.

### Original text of Paula von Preradović

1.  
A Land der Berge, Land am Strome,  
A Land der Äcker, Land der Dome,  
B Land der Hämmer, zukunftsreich!  
C Heimat bist du großer Söhne,  
C Volk, begnadet für das Schöne,  
B |: vielgerühmtes Österreich<sup>10</sup>, :|

2.  
A Heiß umfehdet, wild umstritten  
A liegst dem Erdteil du inmitten,  
B einem starken Herzen gleich.  
C Hast seit frühen Ahnentagen  
C hoher Sendung Last getragen,  
B |: vielgeprüftes Österreich<sup>11</sup>. :|

3.  
A Mutig in die neuen Zeiten,  
A frei und gläubig sieh uns schreiten,  
B arbeitsfroh und hoffnungsreich.  
C Einig lass in Brüderchören,  
C Vaterland, dir Treue schwören,  
B |: vielgeliebtes Österreich<sup>12</sup>.|

### Pop-Version (Christina Stürmer)

1.  
A Land der Berge, Land am Strome,  
A Land der Äcker, Land der Dome,  
B Land der Hämmer, zukunftsreich!  
C Heimat bist du großer Söhne,  
    *und Töchter*  
C *missing*  
B *vielgerühmtes Österreich,*

2.  
A Heiß umfehdet, wild umstritten  
A liegst dem Erdteil du inmitten,  
B einem starken Herzen gleich.  
C Heimat bist du großer Söhne,  
    *und Töchter*  
C *missing*  
B |: *vielgerühmtes Österreich,* :|

3.  
  
- *deleted* -

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<sup>10</sup> ... much praised Austria.

<sup>11</sup> ... sorely afflicted Austria.

<sup>12</sup> ... much beloved Austria.

